

IN THE SUPREME COURT OF FLORIDA

FLORIDA INDUSTRIAL
POWER USERS GROUP,

Appellant,

Case No.: SC15-2146

Lower Tribunal No.: 150075-EI

v.

ART GRAHAM, ETC.,
ET AL.

Appellee(s).

On Appeal from a Final Order of the
Florida Public Service Commission

INITIAL BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP

Jon C. Moyle, Jr.
Florida Bar No. 727016
Karen Putnal
Florida Bar No. 0037745
Moyle Law Firm
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
Attorneys for the Florida
Industrial Power Users Group

RECEIVED, 02/15/2016 07:18:29 PM, Clerk, Supreme Court

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PRELIMINARY STATEMENT AND EXPLANATION OF ABBREVIATIONS

The following abbreviations will be used in this brief:

Appellant the Florida Industrial Power Users Group is referred to as “FIPUG.” Appellee Florida Public Service Commission is called the “Commission” or the “PSC.” Appellee Florida Power & Light Company is designated as “FPL.” The power plant that is the subject matter of this proceeding, the Cedar Bay Generating Facility, is referred to as “Cedar Bay.” The Office of Public Counsel is called “OPC” or “Public Counsel.”

The Record on Appeal is designated as “R. Vol. # at #.” The transcript of the hearing below is designated “Tr. Vol. # at #.” Exhibits introduced at the evidentiary hearing are designated as “Ex. #.” Citations to the Florida Statutes are designated as “F.S.” and will refer to the 2015 version of the statute unless otherwise noted. Citations to the Florida Administrative Code are designated as “F.A.C.” The Florida Administrative Procedure Act, Chapter 120, Florida Statutes is referred to as the “Administrative Procedure Act” or the “APA.” The Florida Evidence Code, Chapter 90, Florida Statutes, is referred to as the “Florida Evidence Code,” or the “Evidence Code.”

STATEMENT OF THE CASE AND FACTS

On March 6, 2015, FPL filed with the Commission a “Petition for Approval of Arrangement to Mitigate Impact of Unfavorable Cedar Bay Power Purchase Obligation.” (R. Vol. 1 at 27). The petition asked the Commission to approve FPL’s purchase of Cedar Bay, a twenty (20) year old coal-fired power plant, for \$520.5 million, and an additional payment of \$326.9 million for taxes the seller would otherwise have to pay. (R. Vol. 1 at 28). Under FPL’s proposal the \$520.5 million paid for Cedar Bay would be recovered from FPL ratepayers. Ratepayers also would pay FPL a “return on equity” on the purchase, commonly known as shareholder profit. (R. Vol. 1 at 42-43).

Through a series of subsidiary companies, Cedar Bay is owned by the Carlyle Group, a publicly traded investment banking company and private equity firm. (Tr. Vol. 2 at 234). FPL had in place a Power Purchase Agreement (“PPA”) with the owners of Cedar Bay to purchase energy and capacity from Cedar Bay over a period of time. In its petition, FPL alleged, based on forecasts of future events, that its purchase of Cedar Bay for \$520.5 million, plus the payment of \$326.9 million for taxes, would save ratepayers money when compared to continuing to pay Cedar Bay’s owners under the PPA. (R. Vol. 1 at 28).

The Office of Public Counsel filed a Notice of Intervention in the case on

March 12, 2015. (R. Vol. 1 at 50-51). FIPUG filed a Petition to Intervene in the case on March 16, 2015. (R. Vol. 1 at 52-56). The Commission acknowledged OPC's notice of intervention and granted FIPUG's request to intervene. (R. Vol. 1 at 57, 68-70). After conducting extensive discovery, both FIPUG and OPC took the position that FPL was significantly overpaying for Cedar Bay, an overpayment that the Commission should disallow so that the overpayment would not be borne by FPL's customers. OPC stated that FPL's petition "can be summed up as an opportunistic proposal to escape an existing PPA that is (and has always been) uneconomic for ratepayers by purchasing a company, taking possession of a 20 year-old coal plant, and canceling the existing Purchase Power Agreement ("PPA"), by creating an innovative labyrinthine accounting scheme that creates guaranteed profits for FPL's shareholders on a cost that was previously a pass-through to customers. . . . FPL's proposed purchase price overstates the Fair Value of the Cedar Bay PPA by, at least, \$150 million." (Prehearing Order Statement of Parties' Positions) (R. Vol. 3 at 488, 489). FIPUG similarly contended that FPL was greatly overpaying for the Cedar Bay plant, and introduced documentary evidence, which the Carlyle Group entity claimed was confidential, that showed the wide disparity between the \$520.5 million that FPL had agreed to pay the Carlyle Group subsidiary for Cedar Bay, and previous

valuations and sales transactions relating to Cedar Bay. (R. Vol. 4 Attachment Three, Exs. 64, 66, and 67). The amount FPL pays for Cedar Bay will be recovered, along with a profit, from FPL's ratepayers. (R. Vol. 1 at 42-43).

Two business days prior to the evidentiary hearing, FPL and OPC abruptly filed a motion for approval of a settlement agreement. (R. Vol. 3 at 508). FIPUG, not having been included in settlement discussions between FPL and OPC, was not a party to the settlement agreement and objected to it. (R. Vol. 3 at 554, 512). FIPUG proceeded to hearing and presented the testimony of four witnesses sponsored by FIPUG. (R. Vol. 1 at 120). FIPUG also conducted cross-examination of witnesses offered by other parties, including an OPC expert witness who testified that the fair purchase price of Cedar Bay is "no more than \$370 million." (Tr. Vol. 2 at 216, 222; *see also*, Brunault, Tr. Vol. 2 at 187, 215). FPL presented four witnesses in its case-in-chief and six witnesses on rebuttal. (R. Vol. 1 at 107-108).

At the outset of the proceeding, FIPUG invoked the rule of sequestration of witnesses pursuant to section 90.616 F.S. (Tr. Vol. 1 at 16). Against the advice of its own counsel, the Commission denied FIPUG's request to invoke the rule. (Tr. Vol. 1 at 35-36). The evidentiary hearing took place on July 27 and July 28, 2015, with parties filing post-hearing briefs on August 13, 2015. At the close of the

hearing, rather than have staff prepare a recommendation addressing the issues as identified in the Commission's prehearing order and as tried by the parties (which included the proper valuation of Cedar Bay), the Commission stated it would proceed to consider approval of the settlement agreement between FPL and OPC, and scheduled a special agenda conference. (Tr. Vol. 4 at 825-26). At a special agenda conference held on August 27, 2015, the Commission approved the settlement agreement. (R. Vol. 4 at 665). The Commission entered its Final Order approving the OPC-FPL settlement agreement on September 23, 2015. (R. Vol. 4 at 696). FIPUG timely filed this appeal on October 21, 2015. (R. Vol. 4 at 707-720).

SUMMARY OF ARGUMENT

Both this Court and the Florida legislature have recognized that a party litigant has a statutory right to have testifying witnesses sequestered when a proceeding involves disputed issues of fact. *See*, section 90.616 F.S and *Hernandez v. State*, 4 So. 3d 642, 662-663 (Fla. 2009). The Commission erred in not recognizing FIPUG's statutory right to invoke "the rule of sequestration" pursuant to section 90.616 F.S. when it summarily denied FIPUG's request to sequester witnesses at the outset of the hearing below.

The Florida Evidence Code, Chapter 90, Florida Statutes, guides and applies

to formal evidentiary proceedings before the Commission. Section 90.103 F.S. specifically provides that the Evidence Code applies to criminal actions, civil action and all other proceedings, unless otherwise provided by statute. § 90.103(1) and (2), F.S. (emphasis added). There is no exemption in the Evidence Code for formal evidentiary administrative proceedings. The Administrative Procedure Act codifies limited exceptions to the Evidence Code, pertaining to hearsay and the nature of admissible evidence in formal evidentiary administrative proceedings, but the APA does not exempt formal evidentiary administrative proceedings from other provisions of the Evidence Code, including the rule of sequestration. *See*, 120.569(2)(g) and 120.57(1)(c), F.S. Chapter 28-106, F.A.C., containing the Uniform Rules of Procedure governing administrative proceedings, also contemplates the application of the Evidence Code to administrative proceedings involving disputed issues of fact. Moreover, the Commission previously has expressly relied on the Evidence Code to support its evidentiary rulings.

FIPUG contends that the right of a party to request the sequestration of witnesses in an evidentiary proceeding, as established by section 90.616, F.S., applies to formal evidentiary administrative proceedings, including proceedings before the Commission. The Commission erred by denying FIPUG's request to sequester witnesses in the formal evidentiary proceeding below pursuant to section

90.616, F.S. The Commission's error deprived FIPUG of a substantive, statutory right.

STANDARD OF REVIEW

Whether the Commission erred in refusing to apply the rule of sequestration, as provided in section 90.616, F.S. to the evidentiary administrative proceeding below is a question of law that is subject to *de novo* review by the Court. *See, W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So.3d 1, 8 (Fla. 2012) (interpretations of statutes are pure questions of law subject to *de novo* review). While “[t]he interpretation of a statute by the administrative agency or body charged with its enforcement is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute, . . . a court need not defer to an agency's construction or application of a statute if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute.” *South Florida Racing Ass'n v. DBPR*, 40 Fla. L. Weekly D1793, *3 (Fla. 3d DCA July 29, 2015) quoting *Donato v. AT&T*, 767 So.2d 1146, 1153 (Fla. 2000) and *Summer Jai Alai Partners v. DBPR*, 125 So.3d 304, 307 (Fla. 3d DCA 2013). Since the Evidence Code is not part of the statutory scheme regulating electric utilities that the Commission is charged with enforcing, no deference is to be afforded to the Commission's interpretation and application of section 90.616 F.S. Moreover, the Commission's interpretation

of section 90.616 in the proceeding below conflicts with the plain and ordinary meaning of the statute. *See, GTE, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007) (no agency deference is given when the plain language of the statute is clear).

While orders of the Commission usually arrive for appellate review accompanied by a presumption of correctness, this case presents a clear departure from the essential requirements of law.

ARGUMENT

I. THE COMMISSION ERRED AS A MATTER OF LAW BY REFUSING TO APPLY THE RULE OF SEQUESTRATION UPON REQUEST AS REQUIRED BY SECTION 90.616, FLORIDA STATUTES

The sequestration of witnesses has been accepted practice in Florida in proceedings involving disputed issues of fact for more than 100 years. *Seaboard Air Line Ry. v. Smith*, 53 So. 375, 380 (Fla. 1907); *Hernandez v. State*, 4 So.3d at 658). As the Court has observed, the purpose of the rule of sequestration is to ensure the fairness of the proceeding, and to ““avoid a witness coloring his or her testimony by hearing the testimony of another,’ thereby discouraging ‘fabrication, inaccuracy and collusion.’” *Knight v. State*, 746 So. 2d 423, 430 (Fla. 1998); *see also, Chamberlin v. State*, 881 So. 2d 1087, 1100 (Fla. 2004); *Jones v. Division of Administration*, 351 So. 2d 365, 366 (4th DCA 1977) (sequestration of witnesses has great benefit as a tool to detect testimonial inconsistencies and fabrications).

The common law rule of sequestration was codified by the Florida legislature in 1990 at section 90.616, F.S. As recognized by the Court, while the Court’s decisions under the common law “emphasized the discretionary nature of the decision to sequester witnesses, section 90.616 adopts the view the sequestration is *demandable as a matter of right.*” *Hernandez*, 4 So. 3d at 662-63 (emphasis added).

The rule of sequestration, as codified in Florida Statutes, is set forth below:

90.616 Exclusion of witnesses.—

- (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).
- (2) A witness may not be excluded if the witness is:
 - (a) A party who is a natural person.
 - (b) In a civil case, an officer or employee of a party that is not a natural person. The party’s attorney shall designate the officer or employee who shall be the party’s representative.
 - (c) A person whose presence is shown by the party’s attorney to be essential to the presentation of the party’s cause.
 - (d) In a criminal case, the victim of the crime, the victim’s next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person’s presence to be prejudicial.

In codifying the rule of sequestration, the Legislature established a two-step process for application of the rule. The first step, set forth in section 90.616(1), is mandatory and non-discretionary, and requires a court or presiding officer to sequester witnesses upon the request of any party. Specifically, the plain language

of section 90.616(1) creates a substantive right (the party's right to sequestration of witnesses) and a substantive duty (the duty of the court to apply the rule upon request) that is not a matter of discretion for the presiding officer. *See* 90.616(1), F.S. (“[a]t the request of a party, the court *shall order*” the sequestration of witnesses.”) (emphasis added); *see also, State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) (the term “shall” generally should be construed as mandatory, particularly where it refers to some action preceding the possible deprivation of a substantive right); *Fernandez v. Guardianship of Fernandez*, 36 So. 3d 175, 176 (Fla. 3d DCA 2010) (pursuant to statutory language in section 90.616 that, “[a]t the request of a party the court shall order,” a party requesting sequestration of witnesses is entitled to application of the rule).

Section 90.616(2) sets forth the “second step,” which permits a court, after ordering sequestration, to exercise discretion in determining whether certain witnesses should not be excluded from the proceeding if any of the specific statutory exceptions set forth in section 90.616(2) apply.

In this case, the presiding officer never contemplated an exception under 90.616(2) because the presiding officer denied FIPUG's request to invoke the rule of sequestration, never getting past step one. The following exchange makes this point clear:

Commissioner Edgar: Alright. Request (to invoke the rule of sequestration) denied. Let's swear in the witnesses.

Ms. Helton (legal advisor to the Commission): And, Madam Chairwoman, just so the record is complete for appellate purposes, I assume that you are denying the request because you believe that the -- other than the representative of Florida Power & Light that they have designated as Mr. Barrett, that you believe the other expert witnesses are necessary to the case and to Florida Power & Light?

Commissioner Edgar: No. I deny the request because it is my decision and opinion that I have the discretion to do so in this administrative proceeding.

(Tr. Vol. 1 at 35-36).

The Commission below erroneously concluded that it had “discretion” to deny FIPUG’s request to invoke the rule of sequestration. As discussed above, section 90.616 unambiguously directs that, upon a party’s request, the presiding officer shall order the exclusion of witnesses from the proceeding. This legislative directive divests the trier of fact of discretion to decide whether or not to apply the rule of sequestration. As noted, the exceptions set forth in section 90.616(2) are not at issue in this case because the request to invoke the rule of sequestration itself was denied.

This Court has recognized that a statutory provision that prescribes rights and duties comprises substantive law. *See, Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), citing *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those

duties and rights), *citing Richardson v. Honda Motor Co.*, 686 F. Supp. 303 (M.D. Fla.1988) (statute which creates a right to attorney's fees is substantive in nature).

FIPUG contends that the Legislature's codification of the rule of sequestration establishes both a substantive right and a corresponding nondiscretionary duty, to protect the fundamental fairness of evidentiary proceedings. *See, Hernandez*, 4 So. 3d at 662-63; *Fernandez*, 36 So. 3d at 176; *see also, Hall v. Hobbs*, 129 S.E. 2d 209, 210 (Ga. App. 1962) ("Under this mandate, we think that the parties are entitled to the benefit of this rule at all stages of the proceedings in the trial of a case, regardless of the purpose of the testimony, and the error in depriving the plaintiff in this case of this substantial right rendered all subsequent proceedings nugatory, requiring the grant of a new trial."); and *Hall v. Hall*, 141 S.E.2d 400, 402 (Ga. 1965) (The right to sequestration of witnesses is "a right conferred by statute, and its denial is presumptively injurious, unless the contrary appears."). The Commission's decision to deprive FIPUG of its statutory right to sequester testifying witness was material error that deprived FIPUG of a fair evidentiary hearing and was a

departure from the essential requirements of law¹.

II. THE FLORIDA EVIDENCE CODE APPLIES TO COMMISSION PROCEEDINGS WHICH ARE CONDUCTED UNDER CHAPTER 120.57(1), FLORIDA STATUTES AND REQUIRES THE COMMISSION TO APPLY THE RULE OF SEQUESTRATION

The Florida Legislature has given direction about the applicability of the Florida Evidence Code to all evidentiary proceedings, as set forth in section 90.103, F.S.:

90.103 Scope; applicability.—

(1) Unless otherwise provided by statute, this code applies to the same proceedings that the general law of evidence applied to before the effective date of this code.

(2) This act shall apply to criminal proceedings related to crimes committed after the effective date of this code and to civil actions and all other proceedings pending on or brought after October 1, 1981.

(3) Nothing in this act shall operate to repeal or modify the parole evidence rule.

(emphasis added). Thus, by its express terms, the Florida Evidence Code applies to criminal proceedings, civil actions *and all other proceedings*. The Legislature's use of the word "all" when describing to which proceedings the Evidence Code

¹ The issue of sequestration of witnesses, along with a host of other issues, was before this Court more than a decade ago in the case of *CPV Gulfcoast, Ltd. v. Jaber*, 879 So. 2d 620 (Fla. 2004). The Court affirmed the Commission without a published opinion or explanation for its decision.

applies leaves little room to argue that administrative evidentiary proceedings should not use the Evidence Code when engaged in sorting out disputed facts. Thus, by the plain terms of section 90.103 F.S., administrative proceedings conducted pursuant section 120.57(1), F.S., are evidentiary proceedings within the scope of “all other proceedings” to which the Florida Evidence Code applies. The APA provides limited statutory exceptions to the Evidence Code for administrative proceedings conducted pursuant to section 120.57(1). These exceptions specifically pertain to the nature of admissible evidence and the admissibility of hearsay in administrative proceedings, and do not create an exception for any other provisions of the Evidence Code, such as the rule of sequestration. *See*, §§ 120.569(2)(g) and 120.57(1)(c), F.S.

The Commission historically has relied on the Florida Evidence Code in a number of its decisions and has previously established through its own final orders that the Florida Evidence Code has applicability to PSC proceedings. For example, in *In re: Application for a rate increase by General Development Utilities, Inc.*, Docket Nos. 911030-WS, 911067-WS; Order No. PSC-92-0326-PCO-WS (1992 Fla. PUC LEXIS 729), the PSC relied on the Evidence Code to deny a motion requesting it to take official recognition of an arbitration proceeding transcript and exhibits in a rate proceeding, stating: “. . . it is important to note that the Commission does rely on and follow the Florida Evidence Code and the

Florida Rules of Civil Procedure in proceedings before it.” *Id.* at 3. Similarly, in *In re: Application for Increase in Rates and Service Availability Changes in Lee County by Gulf Utility Company*, Docket No. 960329 WSC (PSC 1992), the PSC relied on section 90.955 of the Florida Evidence Code to deny a request to supplement the record in a rate determination case, on the ground that “the exhibit with which Gulf seeks to supplement the record has not been authenticated under the applicable evidentiary rules.” *Id.*

Pursuant to section 120.54(5)(a), F.S., the Uniform Rules of Procedure set forth in Chapter 28-106, F.A.C. govern administrative proceedings that determine the substantial interests of a party. Pursuant to the Legislature’s directive, the Uniform Rules provide “procedures for conducting hearings ... for taking evidence, testimony and argument.” § 120.54(5)(b)(2), F.S., Chapter 28-106, F.A.C. Chapter 28-106 F.A.C., underscores that the Evidence Code applies to evidentiary administrative proceedings conducted pursuant to section 120.57(1) of the APA. Tellingly, the Uniform Rule addressing who is able to appear as “a qualified representative” of a party, Rule 28-106.106(4) F.A.C., provides that the presiding officer must ascertain the qualified “representative’s knowledge of the rules of evidence, including the concept of hearsay in an administrative proceeding.” If the Florida Evidence Code is not applicable or to be used in administrative proceedings, why require a qualified representative to have

knowledge of the rules of evidence? As reflected in the prehearing order in the case below, the Commission conducts its proceedings in accordance with Chapter 28-106 F.A.C., including the requirement that qualified representatives possess knowledge of the rules of evidence. (R. Vol. 3 at 483). In sum, the Commission's past and current practice is to use and rely upon the Evidence Code to evidentiary hearings before the Commission. Section 90.616 F.S. of the Florida Evidence Code requires the Commission to order the sequestration of witnesses upon the request of any party and should have been followed by the Commission, not disregarded.

CONCLUSION

FIPUG properly requested the Commission to sequester FPL's witnesses pursuant to section 90.616, F.S. The plain language of Section 90.616 mandates that an order of sequestration be entered upon the request of any party. The Commission's refusal to apply the rule of sequestration upon FIPUG's request was clear error that violated the plain language of section 90.616, F.S. and deprived FIPUG of a substantive right affecting the fairness of the proceeding below. For the reasons set forth herein, this Court should reverse the PSC's Final Order which FIPUG appealed and remand this case to the PSC to remedy its error.

Respectfully submitted this 15th day of February, 2016.

/s/ Jon C. Moyle, Jr.

Jon C. Moyle, Jr.

Fla. Bar No. 727016

Karen Putnal

Fla. Bar No. 37745

Moyle Law Firm

118 North Gadsden Street

Tallahassee, FL 32301

ATTORNEYS FOR APPELLANT,
THE FLORIDA INDUSTRIAL
POWER USERS GROUP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2016, a true and correct copy of the Initial Brief of Appellant, FIPUG, was served by electronic mail on those listed below:

Pamela H. Page
Mary Anne Helton
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
phpage@psc.state.fl.us
mhelton@psc.state.fl.us
Counsel for PSC

R. Wade Litchfield
John T. Butler
Maria J. Moncada
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
wade.litchfield@fpl.com
john.butler@fpl.com
maria.moncada@fpl.com
Counsel for FPL

Ken Hoffman
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, Florida 32399-1400
Ken.hoffman@fpl.com
Counsel for FPL

J.R. Kelly
Charles J. Rehwinkel
John Truitt
Office of Public Counsel
111 West Madison Street, room 812
Tallahassee, FL 32301
kelly.jr@leg.state.fl.us
rehwinkel.charles@leg.state.fl.us
truitt.john@leg.state.fl.us
Counsel for OPC

Alvin Davis
Squire Patton Boggs (US) LLP
200 South Biscayne Blvd, Suite 4700
Miami, Florida 33131
Alvin.davis@squirepb.com
Counsel for FPL

Robert Scheffel Wright
John T. LaVia III
Gardner, Bist, Bowden, Bush, Dee,
LaVia & Wright PA
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com

/s/ Jon C. Moyle, Jr.
Jon C. Moyle, Jr.

CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that the type font used throughout this Initial Brief of FIPUG is Times New Roman 14-point.

/s/ Jon C. Moyle, Jr.
Jon C. Moyle, Jr.